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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000898-MR

JIMMY GEORGE AND
COLENE GEORGE — APPELLANTS

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 02-CI-00073

FLOYD EVANS; SARA EVANS;
RONDAL WRIGHT; SHARON WRIGHT;
CHARLES POTTINGER; AND
LORENE POTTINGER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Jimmy and Colene George appeal from two orders of the Hart Circuit Court that, on remand from this court, dismissed the Georges' claims in a boundary line dispute. We affirm.

In 1993, the Georges purchased a tract of land in Hart County from Floyd and Sara Evans and Rondal and Sharon Wright. The deed described the property by

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

its existing boundaries, rather than by metes and bounds. The deed also stated that the tract contained "100 acres more or less." The Georges did not have a survey conducted prior to their purchase.

About nine years later, the Georges discovered that their property actually may include an additional 50 acres, more or less, of land beyond their fenced boundary with their neighbors Charles and Lorene Pottinger. They also discovered that the Pottingers had sold timber from the disputed 50 acres.

On April 8, 2002, the Georges filed suit in Hart Circuit Court against the Pottingers, the Evanses and the Wrights as their predecessors in title, Danny and Lovina Bishop, who used the property to graze livestock, Michael Yokely and his company Dale Hollow Lumber, which held a timber lease on the property, and John Luckett, a forestry appraiser who took bids on timber cut from the land. The Georges were represented by an attorney, A. Woodson Pulliam.

Initially, the Georges prosecuted their claim by taking depositions and filing motions. However, from July 2003, no action was taken in the case for more than one year. On August 13, 2004, the circuit court issued an order pursuant to Kentucky Rules of Civil Procedure (CR) 77.02 directing the parties to show cause why the action should not be dismissed for failure to prosecute. The Georges responded on September 3, 2004, by requesting a trial date.

The court set a trial date of January 24, 2005, and a pretrial/settlement conference date of January 14, 2005, at 9:00 a.m. The order contained the following provision:

> **WARNING:** Failure to comply with the pre-trial and/or pre-conference requirements . . . will probably result in imposition of one or more of the sanctions provided for under Chapter One, Sec. F(2) of the Local Rules.

Under these local rules, parties to a case are required to file a pretrial statement no later than 60 days prior to trial. None of the parties did so.

On the day of the pretrial conference on January 14, 2005, Pulliam failed to timely appear in court. The judge telephoned Pulliam's office (which was located across the street from the courthouse) and was assured by Pulliam's secretary that he was "walking out the door." Nonetheless, Pulliam did not appear, and the court granted the defendants' oral motion to dismiss the case. At approximately 9:45 a.m., Pulliam and the Georges finally arrived. At that time, Pulliam provided the court with the belated pretrial statement. The court noted that the statement was both late and incomplete.

On January 24, 2005, Pulliam filed a motion to alter, amend, or vacate the involuntary dismissal. The court considered the motion and ordered the Georges to file, within 30 days, a memorandum outlining the issues of fact in their case. Pulliam filed the memorandum seven days late. The court ultimately denied the motion to alter, amend, or vacate because the Georges had failed to comply with the orders of the court.

In their first appeal to this court, the Georges argued that the circuit court had abused its discretion in dismissing their claims because it had failed to consider the factors enumerated in *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991). In *Ward*, this court adopted the guidelines set forth in *Scarborough v. Eubanks*, 747 F.2d 871 (3rd Cir. 1984), to determine whether a case should be dismissed under CR 41.02 for dilatory conduct of counsel. Under *Ward*, trial courts are directed to evaluate: 1) the extent of the party's personal responsibility; 2) the history of dilatoriness; 3) whether the attorney's conduct was willful and in bad faith; 4) meritoriousness of the claim; 5) prejudice to the other party; and 6) alternative sanctions. *Ward*, 809 S.W.2d at 719-20. This court remanded the case with directions to the circuit court to determine the

propriety of the dismissal in light of the six *Ward* factors. *See George v. Pottinger*, 2005-CA-001318-MR, 2006 WL 2918947 (Ky.App. Oct. 13, 2006).

On October 26, 2006, the circuit court entered an order requiring the parties to "advise as to whether any further proof should be taken or any further memorandums submitted" before it reviewed the dismissal in light of the *Ward* factors. On November 21, 2006, the parties agreed that no further proof should be taken. After the parties submitted their memoranda, the trial court issued an order in which it applied the *Ward* factors and again dismissed the Georges' causes of action with prejudice.

The Georges filed a motion to alter, amend, or vacate. On April 3, 2007, the circuit court entered an order granting the motion to the extent that the Georges' action to quiet title against Charles and Lorene Pottinger was dismissed without prejudice. The court denied the motion as to remaining causes of action. This second appeal by the Georges followed.

In reviewing the circuit court's application of the *Ward* factors, we are mindful that the application of CR 41.02 "is subject to the sound discretion of the trial judge." *Ward*, 809 S.W.2d at 720. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004).

The first *Ward* factor is the extent of the parties' personal responsibility. Under this factor, the court noted that the Georges allowed their attorney to do nothing for more than one year until the court issued a show cause order. Furthermore, the court noted that the Georges were fully aware that their case had been dismissed on January 14, 2005, yet they allowed Pulliam to continue his representation of them until their motion to alter, amend, or vacate was denied.

The Georges argue that this analysis fails to consider Jimmy George's affidavit, in which he explained that he had done everything Pulliam had requested of him and was unaware that Pulliam had not kept him advised of many court proceedings. George stated that he had paid Pulliam $2,500 for attorney's fees, $9,000 for surveys, and $1,000 for depositions. He concluded by stating that he thought it unfair for the court to dismiss the case on the basis of his former attorney's conduct and that he had been denied access to the court because he had chosen an incapacitated attorney.

The Georges have also drawn our attention to the fact that Pulliam submitted an affidavit stating that the dismissal was entirely his fault and that the circuit court's first order of dismissal placed the blame squarely on Pulliam. In addition, the Georges note a factual misstatement by the court in that Pulliam lost his license to practice one month before their motion to alter, amend, or vacate was denied.

The circuit court did not abuse its discretion in attributing some of the responsibility for the various delays to the Georges. A client must bear some responsibility for his or her attorney's actions.

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.

Link v. Wabash R. Co., 370 U.S. 626, 633-634, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962) (citations and quotation marks omitted).

> A litigant may not employ an attorney and then wash his hands of all responsibility. The law demands the exercise of due diligence by the client as well as by his attorney in the prosecution or defense of litigation.

Gorin v. Gorin, 167 S.W.2d 52, 55 (Ky. 1942). Also, in *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797 (Ky.App. 1984), this court held that the "[n]egligence of an attorney is imputable to the client and is not a ground for relief under CR 59.01(c) or CR 60.02(a) or (f)." *Id*. at 799.

The court's finding that some responsibility must attach to the Georges for Pulliam's actions is not invalidated by Pulliam's acceptance of the blame for the dismissal or the fact that the first order of the court placed the blame on Pulliam. Furthermore, although he was disbarred prior to the denial of the motion to alter, amend, or vacate, the Georges allowed him to continue his representation and to file that motion even though they were aware that his dilatoriness had led to the dismissal of their case.

The second *Ward* factor considered by the court was the history of dilatoriness. The Georges argue that the circuit court did not find a "history of dilatoriness" in its first order of dismissal, although they acknowledge that the court did find that there had been one year of inactivity on the case, the pretrial statement was 50 days late, the statement of issues of material fact was seven days late, and the plaintiffs arrived at the pretrial conference 45 minutes late. In its February 20, 2007, order of dismissal, the court also alluded to the incomplete pretrial statement.

The Georges argue that none of these delays is imputable to the Georges in view of Jimmy George's affidavit. As we have already stated, however, the law places some responsibility on the client for the actions of his attorney. *See Gorin*, *supra*.

The Georges also challenge the trial court's inclusion of the incomplete pretrial statement as evidence of a history of dilatoriness, arguing that the defendants also failed to file pretrial statements yet were not sanctioned. However, the incomplete

pretrial statement was only one incident in a lengthy history of dilatoriness as outlined by the court. There is no suggestion that the incomplete statement on its own would have been sufficient to warrant a dismissal.

Next, the court considered whether the attorney's conduct was willful or in bad faith. The Georges argue that the circuit court made no finding that Pulliam's dilatory conduct rose to the level of flagrant bad faith as it was defined in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976), a case relied upon in *Scarborough, supra.* But, the type of conduct found to stem from "flagrant bad faith" in *National Hockey League* is the type of conduct at issue here – failure to answer crucial interrogatories despite numerous extensions, disregarding admonitions of the court, and failure to perform an act by a certain date and then waiting for five days afterwards before filing any motions. *See National Hockey League*, 427 U.S. at 640, 96 S.Ct. at 2779.

The circuit court found that Pulliam, as a member of the Hart County Bar Association, was well aware of the importance of filing a timely pretrial statement because the court had consistently sanctioned attorneys for their failure to comply with the Local Rules. The circuit court also found statements in Pulliam's affidavit in which he admitted that he knew the matter was not fully through the discovery phase and had merely believed that the court would not take such "draconian action" as dismissal. Most tellingly, Pulliam was also unable to explain why he did not comply in a timely manner with the court's request for a memorandum to support his motion to alter, amend, or vacate. The court also alluded to charges against Pulliam by the Kentucky Bar Association and to the court's personal knowledge of Pulliam based on its observation of him in the conduct of other cases. We conclude that the court did not

abuse its discretion in finding that Pulliam's conduct was characterized by willfulness and bad faith.

The next factor considered by the circuit court was the meritoriousness of the Georges' claim. The Georges' argument relies in part on a survey that they contend shows the disputed 50 acres is within their deed description. The record contains a court order, entered in response to a motion by the Georges, permitting them to survey and examine three tracts of land as part of the discovery process. The survey was eventually conducted and is attached as an exhibit to the Georges' brief, but it was never made part of the record and was therefore never considered by the circuit court. It is well settled that matters not disclosed by the record cannot be considered on appeal. *Hamner v. Best*, 656 S.W.2d 253, 256 (Ky.App. 1983).[2]

The circuit court assessed the meritoriousness of the Georges' claims against Floyd and Sara Evans and Rondal and Sharon Wright (the parties from whom the Georges purchased their property in 1993) for breach of the covenant of general warranty. The Georges contend that if they are not now in possession of the estate contained within the boundaries of the deed, then Evans and Wright breached the covenant of general warranty and are liable to the Georges. The circuit court found little merit in this claim, however, because the deed of conveyance from the Evanses and Wrights purported to transfer "100 acres more or less," whereas the Georges had never asserted that they had not received 100 acres more or less.

Furthermore, the Georges had initiated this action in order to claim an additional 50 acres north of their fenced boundaries. Relying on *Ralston v. Thacker*, 932 S.W.2d 384 (Ky.App. 1996), the circuit court concluded that since the purpose of the covenant of general warranty of title was to protect purchasers from the claims of

[2] The trial court gave the parties the opportunity to present additional proof before ruling on the dismissal, and the Georges could have introduced the survey into the record at that time. They did not do so, however.

others, it could not be used to make claims for additional acreage. We see no error in the court's analysis of this claim and in its finding that the claim likely lacked merit

As to the actions against the Pottingers to quiet title, for timber trespass, and for treble damages pursuant to Kentucky Revised Statutes (KRS) 364.130, the circuit court initially found that it was without sufficient information to determine whether there was merit in the action to quiet title and concluded that there was little merit in the other claims. It dismissed all claims with prejudice. The Georges filed a motion to alter, amend, or vacate. After reviewing the motion, the court amended its prior order and dismissed the action to quiet title without prejudice but left the other causes dismissed with prejudice.

On appeal, the Georges dispute the Pottingers' counterclaims that they own the disputed 50 acres by deed or by adverse possession. The Georges argue that they hold "paper title" to the entire tract and that there were never any findings made as to the Pottingers' claims of adverse possession. The circuit court conceded that it was without sufficient information to determine whether there was merit in the Georges' quiet title action. Therefore, it dismissed that action without prejudice.[3]

As to the claims of timber trespass and for statutory treble damages, the circuit court found these to be lacking in merit because the Georges would first have to prove their ownership of the disputed area and then show that the claims were not barred by the statute of limitations. KRS 413.120(2) and (4) provide a five-year limitations period within which to commence actions based on trespass to real property and for liability created by statute.

The trees in question were cut down in late 1995 or early 1996; the complaint was filed on April 8, 2002. The Georges nonetheless argue that their timber

[3] The fact that the merits of the quiet title action are unclear is a factor in the Georges' favor. However, the court was required to consider all six Ward factors, not just the merits of the action, and it did so.

trespass claim is governed by the 15-year statute of limitations for actions based upon a written contract, KRS 413.090(2), because the Pottingers entered into a contract for the cutting of the timber, and by the 15-year statute of limitations for the recovery of real property under KRS 413.010 because, they contend, standing timber is real property.

The Georges have provided no support for these contentions. The circuit court did not abuse its discretion in finding little merit in these claims due to the operation of the five-year statute of limitations. Furthermore, those parties that actually timbered the trees were not made parties to this appeal.

The fifth factor considered by the circuit court was prejudice to the other parties. Here, the court concluded that the defendants had in all likelihood incurred legal expenses preparing for the pretrial conference and trial and that these expenses increased when the case was appealed and remanded. The Georges argue that these expenses were overstated since the defendants did not file pretrial compliance statements or a motion to dismiss. They also argue that they (the Georges) were entitled to appeal the dismissal of their case.

Nevertheless, the defendants had to retain legal counsel, who filed answers to the complaint and represented them in court and at depositions. Had the case proceeded without delays, the defendants would not have incurred the expenses of two appeals. This case has now been in litigation for almost six years. We conclude that the court did not abuse its discretion in finding prejudice to the other parties.

The final factor considered by the circuit court was the possibility of alternative sanctions. The Georges contend that Pulliam was given no warning that he was jeopardizing their claims and that the matter could have been more appropriately resolved by a finding of contempt of court against Pulliam or by the imposition of fines, costs, or attorney's fees.

The circuit court pointed out that from June 20, 2003, until January 1, 2007, it had presided over the second heaviest caseload of all circuit judges in Kentucky, yet had not involuntarily dismissed any cases except for this action. The circuit court cited Pulliam's egregious disregard for the Orders and Local Rules of the court. Those matters were legitimate concerns.

Although dismissal of a case pursuant to CR 41.02 "should be resorted to only in the most extreme cases" and we must "carefully scrutinize the trial court's exercise of discretion in doing so," *Polk v. Wimsatt*, 689 S.W.2d 363, 364-65 (Ky.App.1985), the U.S. Supreme Court has noted that "here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League*, 427 U.S. at 643, 96 S.Ct. at 2781. Further, the question is not whether this court would have dismissed the action but whether the circuit court abused its discretion in doing so. 427 U.S. at 642, 96 S.Ct. at 2780. We conclude that the decision of the circuit court to impose the sanction of dismissal was not an abuse of discretion in this case.

For the foregoing reasons, the orders of the Hart Circuit Court are affirmed.

MOORE, JUDGE, CONCURS.

WINE, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

WINE, JUDGE, DISSENTING: I regretfully cannot concur with the majority opinion and the reasoning therein. As a former trial judge, I can appreciate the concerns of any trial court trying to effectively manage a burgeoning docket. However, I am concerned with the February 20, 2007, findings of the trial court which state in part:

> The plaintiffs have attempted to blame all of (Arthur Woodson) Pulliam's failures on substance abuse issues. Although this Court is aware of Pulliam's history of substance abuse, Pulliam seemed to have other problems. . . . In addition, this Court personally observed Pulliam having problems with other cases throughout this same time period.

The underlying action was filed in April 2002, approximately six months prior to an agreed, but probated, sixty-one day suspension to practice imposed by the Kentucky Supreme Court. Pulliam had admitted to unprofessional conduct as well as a second DUI conviction. *Pulliam v. Kentucky Bar Association*, 84 S.W.3d 455 (Ky. 2002). Subsequently that sentence was imposed in April 2005 when the Supreme Court found Pulliam had violated the conditions of probation when he again was arrested for driving under the influence in 2004. *Pulliam v. Kentucky Bar Association*, 160 S.W.3d 187 (Ky. 2005).

Further, in July 2003, Pulliam pled guilty to possession of marijuana and attempted possession of a controlled substance in the first degree. In July 2005, the Kentucky Bar Association Inquiry Commission recommended an additional 181-day suspension of Pulliam's license to practice law. The Supreme Court ordered that suspension in May 2006. *Kentucky Bar Association v. Pulliam*, 190 S.W.3d 925 (Ky. 2006). Thus, while the underlying action was pending trial and when Pulliam appeared late for the pretrial in January 2005, there was an ongoing disciplinary investigation, of which Pulliam was not required to advise any of his clients.

While he was never reinstated to membership, the Kentucky Board of Governors of the Kentucky Bar Association recommended in June 2007 that Pulliam be permanently disbarred. Five separate disciplinary actions were considered, including a conviction of reckless driving and DUI for offenses occurring in 2004, and four separate clients who complained Pulliam had not provided adequate representation between July

2004 and January 2005, the same period during which the Georges complain he did not adequately represent them and the same time period to which the trial judge references. Subsequently, in September 2007, the Supreme Court ordered the permanent disbarment of Pulliam from the practice of law. *Kentucky Bar Association v. Pulliam*, 232 S.W.3d 520 (Ky. 2007).

It is readily apparent from this history, as well as the trial court's own personal knowledge, that Pulliam was not able to render effective legal counsel to many of his clients. Contrary to the court's finding that the Georges did nothing for a year while their case languished, is Jimmy George's uncontroverted affidavit that he was paying his attorney considerable amounts of money creating a reasonable expectation that the case was progressing. It would be unreasonable to expect a client to check court records and challenge counsel's representations that he was fulfilling his professional and legal obligations. Obviously from the reported final disciplinary action, which was decided after the trial court made its decision to dismiss this action, Pulliam had successfully pulled the wool over the eyes of several other members of the Hart County community.

The trial court considered the dismissal in light of the six factors annunciated in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991). However, it is readily apparent that the majority of those findings (as well as the proposed majority opinion) dealt with the misconduct of Pulliam and not the Georges. Both the findings of dilatory conduct and bad faith are directly attributed to Pulliam. While the court believes the Georges bear some responsibility, the finding is based upon a false premise that they knew their attorney was doing nothing. To the contrary, they were complying with Pulliam's directives to send money for various and appropriate legal actions. It is not

clear why the court faults them for allowing Pulliam to represent them when he filed a motion to reconsider the dismissal.

When reviewing the merits of the claims, the court candidly admits it does not have enough information as to one claim to decide if the plaintiffs would prevail. There is clearly an issue as to the applicable statute of limitations. However, as discovery was never completed and the issue never briefed, it is unclear how the trial court or this Court can say the plaintiffs would not prevail.

In deciding prejudice to the other parties, the court only decides that attorney fees may have been or might be incurred, hardly an unusual circumstance for any litigant. Finally, when considering alternative sanctions, the court again only expresses how Pulliam could be punished.

While judicial economy and speedy resolution of pending litigation is important, they should not prevail over judicious and fair resolution of such matters. Accepting the trial court's representation that it labored under one of the heaviest caseloads in Kentucky and dismissed only this case for noncompliance, it makes little sense that this dismissal either helped to significantly reduce its caseload or served as a warning to other hardworking members of the local bar. Rather, the Georges paid the ultimate price for an attorney whose behavior is an exception to the rule and expectation of diligent representation by members of the bar.

The multiple disciplinary actions against Pulliam, as well as the various citizens of Hart County affected by the unprofessional conduct of Pulliam, serve as a reminder that all judges have an obligation to report attorneys when their conduct is inappropriate as mandated by KRS 26A.080.

As a result, I believe the trial court abused its discretion by dismissing all but one claim with prejudice.

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